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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-249

JOHN S. ROWE, *Petitioner*,

v.

H. CHRISTIAN DeBRUYN, JACK DUCKWORTH, MICHAEL J. WATSEN, LACY MORRIS, and RICK L. ROBINSON, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a prisoner's due process rights are violated when he receives no punishment in a prison disciplinary because the disciplinary body considers self-defense a mitigating factor, but does not permit the prisoner to assert self-defense as a complete defense in the disciplinary proceeding?

Table of Contents

Question Presented i

Statement of the Case 1

Reasons for Denying the Writ of Certiorari 5

I. This Case Does Not Actually Present The Question In the Petition 5

II. Rowe Waived His Substantive Due Process Claim by Not Raising It In the District Court 6

III. This Case Presents No Important Question of Federal Law 7

IV. The Decision of the Court of Appeals Is Correct . 8

Conclusion 12

Table of Authorities

Cases

Block v. Rutherford, 468 U.S. 576 (1984) 11

Bowers v. Hardwick, 478 U.S. 186,
reh. denied, 478 U.S. 1039 (1986) 8

City of Springfield v. Kibbe,
480 U.S. 257, reh. denied, 481 U.S. 1033 (1987) 6

Gaston v. Taylor, 946 F.2d 340 (4th Cir. 1991) 6

Glass v. Blackburn, 791 F.2d 1165
(5th Cir. 1986), cert. denied, 481 U.S. 1042 (1987) . 8

Palko v. Connecticut, 302 U.S. 319 (1937) 9

State v. Cowan, 861 P.2d 884 (Mont. 1993),
cert. denied, 114 U.S. 1371 (1994) 8

Turner v. Safley, 482 U.S. 78 (1987) 11

White v. Arn, 788 F.2d 338 (6th Cir. 1986),
cert. denied, 480 U.S. 917 (1987) 8

Statutes and Rules

Ind. Code § 35-41-3-2 6

Sup. Ct. R. 10.1(c) 7

Other

Augustine, Letter 47, reprinted in Select Library of Nicene & Post-Nicene Fathers (Schaff ed. 1907) .. 9

Brock, Pacifism in the United States (1968) 9

Fabricant, Homicide in Response to a Threat of Rape, 11 Golden Gate L. Rev. 945 (1981) 12

Gandhi, Collected Writings on Non-Violent Resistance (1951) 10

Hanigan, Martin Luther King Jr. and the Foundations of Nonviolence (1984) 10

Matthew 5: 38-39 (Revised Standard) 9

Indiana Dep't of Correction Adult Disciplinary Policy & Procedures 6

Peace & Nonviolence (Guinan ed. 1973) 9, 10

Sloan, Law of Self-Defense (1987) 9

Universal Declaration of Human Rights 9

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents H. Christian DeBruyn, Commissioner of the Indiana Department of Correction, et al., hereby oppose John S. Rowe's Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

John Rowe, then a prisoner at the Indiana Reformatory, was brought before a prison disciplinary body known as a Conduct Adjustment Board on August 1, 1991, charged with

battery. a-25.[1] The Board, consisting of the three correctional officers who are defendants in this case, concluded that Rowe had struck another prisoner, Michael Evans, on the head with a hot pot. Id. The Board imposed punishment of one year in disciplinary segregation but suspended the sentence because it considered Rowe's claim of self-defense to be a mitigating circumstance. Id.

According to Rowe, Evans instigated the fight that led to his sanction. a-2. Evans entered Rowe's cell, and Rowe contends that Evans struck him first. Id. Rowe contends that Evans entered Rowe's cell to rape Rowe. Id. There also was evidence that Rowe had made sexual advances to Evans, AAB 24, 33, but the Board made no finding on the issue. The fight was broken up by guards and another inmate, Richard Perez. Id.

Rowe, Evans and Perez all were disciplined for the incident, although the record does not reveal the punishments given Evans and Perez. Perez was disciplined because his presence in Rowe's cell, even to break up a fight, violated prison rules. AAB 25-27.

In deposition testimony on which Rowe relied, one member of Rowe's Conduct Adjustment Board and the Superintendent of the Reformatory testified that self-defense cannot be a complete defense in a Board hearing. AAB 31, 40. The Board member stated in his affidavit that "[a]ny act of violence or assaultive behavior by an inmate against another inmate must result in the filing of a conduct report and a guilty finding to deter such violence." S.A.3. The

[1] Citations to the appendix of the Petition for Certiorari are referred to as "a-___." Respondents adopt Petitioner's notation of "AAB ___" for Petitioner's Record Appendix in the Court of Appeals. Respondents' citations to "S.A.___" refer to Respondents' Supplemental Appendix in the Court of Appeals.

Board member stated that recognizing self-defense as a complete defense "would only encourage offenders to use force in the name of self-defense and would provide a recognized excuse for the use of force." Id. He also testified that:

> In the event of a fight where one offender is clearly acting in self-defense, he is still found guilty of it. If not, that's giving other offenders the green light to go ahead and act out as they feel -- any conduct reports that we have for any act of violence, if they get enough witnesses to say they were acting in self-defense, that just gives other offenders the green light to go out with a shank or whatever and just do whatever they feel like doing to other offenders, and I feel it would just have an adverse effect on the security of the institution.

AAB 34.

The Board member also testified that the Board concluded that while Rowe initially may have acted in self-defense, he ultimately used excessive force against Evans, striking him three times on the head with a hot pot. AAB 33; S.A. 2. The District Court agreed that he used excessive force. a-25. The Board determined, however, that Rowe's defense of himself against Evans's aggressive actions constituted mitigating circumstances and, therefore, suspended the penalty. AAB 33; S.A. 2. "[W]hen self-defense is proven, the Conduct Adjustment Board takes that factor into account and may change that charge to a lesser offense or consider self-defense as a mitigating factor in the sanction imposed." S.A. 4.

Rowe filed his complaint pursuant to 42 U.S.C. § 1983 on December 30, 1991. AAB 10. He named as defendants James E. Aiken, former Commissioner of the Indiana Department of Correction; Jack Duckworth, Superintendent of the Indiana Reformatory; and Michael J. Watsen, Lacy Morris and Rick L. Robinson, correctional officers who were members of the Conduct Adjustment Board that heard Rowe's case.

The District Court granted summary judgment in favor of Defendants. a-24. The District Court ruled that because Rowe had received a suspended sentence based on his claim of self-defense, and neither served time in segregation nor lost sentence credits, the disciplinary proceeding did not affect any protected liberty interest. a-27. The District Court also ruled that Indiana's policy not to recognize self-defense as a complete defense in prison disciplinary cases was a reasonable exercise of correctional judgment. a-28.

The Court of Appeals affirmed, rejecting Rowe's argument that an Indiana statute conveyed on him a liberty interest in asserting self-defense. a-6 to -7. Then, for the first time analyzing Rowe's claim under the rubric of substantive due process, the Court of Appeals ruled that there is no constitutional right for a person in Rowe's position to assert self-defense. a-9 to -10. Finally, the Court of Appeals ruled that even if there were a constitutional right to self-defense, Indiana could lawfully decline to recognize such a right in the correctional context in order to promote orderly prison administration. a-11. Rowe petitioned for rehearing with suggestion for hearing en banc. The Court of Appeals denied the petition on May 3, 1994. a-19. Respondents also petitioned for rehearing. Their petition was denied May 5, 1994, although the Court of Appeals amended its opinion based on Respondents' petition. a-22.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Because Rowe actually was permitted to raise self-defense in his prison disciplinary proceeding and his claim of self-defense caused his sentence to be suspended, this case does not present the question stated in the Petition for Certiorari. Moreover, Rowe has waived any claim that he has a substantive due process right to assert self-defense because he did not raise that claim in the District Court. Below, he only contended that an Indiana statute gave him the right to raise self-defense.

The question in this case is not of sufficient importance to justiify certiorari. The issue has not been the subject of any other reported case and there is no conflict between the decision of the Seventh Circuit and the decision of any other Court of Appeals or State court. The Seventh Circuit's decision is correct because the right to self-defense is not sufficiently well-established, especially for prison inmates, to rise to the level of a fundamental right guaranteed by the Due Process Clause.

I. THIS CASE DOES NOT ACTUALLY PRESENT THE QUESTION IN THE PETITION.

Because Rowe was afforded the opportunity to present his defense of self-defense in the prison disciplinary proceeding, this case does not afford the Court an opportunity to decide the "Question Presented" in the Petition for Certiorari. Moreover, because Rowe's sentence was suspended based on his claim of self-defense, and no term or condition of his confinement was altered as a result, he has no claim for relief at this stage of the litigation. See a-27

(District Court holds that no liberty interest was affected by prison disciplinary case against Rowe).

Rowe's statement that the State "did not allow Rowe to raise the defense of self-defense," Petition at 3, is false. He was permitted to raise self-defense, not as a complete defense, but as mitigation which in this case precluded any punishment. The Conduct Adjustment Board that heard his case accepted self-defense as a mitigating factor and completely suspended Rowe's sentence. Id. He was not punished for his infraction, but received only a suspended sentence of one year in segregation. Id. On July 18, 1992, when a year had passed from the date of his Conduct Adjustment Board hearing, the threat that any part of his sentence of segregation would be imposed was eliminated. See Indiana Department of Correction Adult Disciplinary Policy and Procedures at G.23.C(4).

II. ROWE WAIVED HIS SUBSTANTIVE DUE PROCESS CLAIM BY NOT RAISING IT IN THE DISTRICT COURT.

Rowe did not make a substantive due process claim in the District Court although it is the centerpiece of his Petition for Certiorari. In the trial court, Rowe only argued that Ind. Code § 35-41-3-2, which codifies the defense of self-defense in Indiana's criminal code, applied to his prison disciplinary proceeding or created a liberty interest under the Fourteenth Amendment. a-9.[2] By failing to raise this argument in the District Court, Rowe has waived it. City of

[2] The Court of Appeals rejected this argument. a-9. The District Court did not even reach this argument because it found that Rowe was deprived of no liberty interest because the suspended sentence he received brought about no change in the length or condition of his original sentence. a-27 (citing Gaston v. Taylor, 946 F.2d 340 (4th Cir. 1991) (en banc).

Springfield v. Kibbe, 480 U.S. 257, reh. denied, 481 U.S. 1033 (1987).

Moreover, because Rowe did not raise the substantive due process point until his appeal, the record is inadequate for certiorari. Because the substantive due process issue was not raised until this matter reached the Court of Appeals, the Respondents were not able to develop a full record in the trial court relating to whether the Constitution recognizes a substantive due process right to self-defense in prison disciplinary proceedings.

III. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

The question presented in this case is not an "important question of federal law," so certiorari is not appropriate under Sup.Ct.R.10.1(c). Rowe offers no reason why the question whether there is a "fundamental right" to assert self-defense as an absolute defense in prison disciplinary proceedings has significance outside this litigation. In fact, the question is of little more than academic interest to Rowe himself.

There is no other reported litigation raising this issue in any other jurisdiction. Neither Rowe in his Petition, the Court of Appeals in its opinion, nor Respondents has found any other reported case that analyzes whether self-defense is a "fundamental right" for prisoners in prison disciplinary proceedings. In the heavily-litigated area of prisoners' rights, the lack of other litigation raising this issue shows that it is not an "important question of federal law which has not been, but should be, settled by this Court." Sup.Ct.R.10.1(c).

The question Rowe raises in his Petition for Certiorari is not even an "important question" to Rowe himself. As discussed above, Rowe was allowed to assert self-defense

and, in his case, his imprecation of self-defense precluded him from suffering any actual punishment. Because self-defense mitigated his sentence, Rowe suffered no harm as a result of the policy he challenges in this case.

Also, no other United States Court of Appeals or highest State court has ruled in conflict with the Seventh Circuit on this issue. The Seventh Circuit's decision is consistent with the only other case the parties have found that deals with the issue, White v. Arn, 788 F.2d 338 (6th Cir. 1986), cert. denied, 480 U.S. 917 (1987). White found that there is no constitutionally-protected right to self-defense. Similarly, other courts have rejected the notion that familiar criminal law defenses are enshrined by the due process clause. Glass v. Blackburn, 791 F.2d 1165, 1171 (5th Cir. 1986), cert. denied, 481 U.S. 1042 (1987)(duress); State v. Cowan, 861 P.2d 884, 889 (Mont. 1993), cert. denied, 114 S.Ct.1371 (1994) (insanity).

Because there is no indication that the question Rowe presents in his Petition for Certiorari is an "important question," this Court should deny the petition.

IV. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The Seventh Circuit correctly decided that there is no fundamental constitutional right to self-defense for a prisoner in a prison disciplinary proceeding. a-9 - a-10. In its present posture, the question before the Court is whether such a right is conveyed as an element of substantive due process. a-6. To qualify as fundamental under substantive due process analysis, rights must be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" Bowers v. Hardwick, 478 U.S. 186,

191-92, reh. denied, 478 U.S. 1039 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

Although the common law or statutory right to self-defense is clearly established in many States in some form, the doctrine is not so universal as to render it fundamental for purposes of substantive due process. The doctrine is embodied in statutes in at least thirty-four States, but its scope and prerequisites vary greatly from one jurisdiction to another. See Sloan, Law of Self-Defense at 55-95 (1987) (quoting self-defense statutes of 34 jurisdictions). The great variation in self-defense law from one jurisdiction to another undermines the claim that it is "fundamental."[3]

Self-defense is not "engraved into our culture and upbringing." Petition for Certiorari, n. 8. Although established in Jewish, Ancient Greek, and English traditions, self-defense is inimical to basic Christian principles. Matthew 5:38-39 ("You have heard that it was said, 'An eye for a eye and a tooth for a tooth.' But I say to you, Do not resist one who is evil. But if anyone strikes you on the right cheek, turn to him the other also.") (Revised Standard). Early Christian philosophers therefore rejected self-defense. See Augustine, Letter 47, reprinted in I Select Library of Nicene & Post-Nicene Fathers 292-294 (Schaff ed. 1907).

Self-defense is inconsistent with significant strands of religious thought. Brock, Pacifism in the United States 889-919 (1968) (Quakers, Mennonites, Brethren); Hahn, "Love in Action," reprinted in Peace and Nonviolence 90-97 (Guinan ed. 1973) (Buddhism); Ballou, "Christian

[3] Petitioner's reference to the Universal Declaration of Human Rights, Petition at 8, is misleading. The declaration contains no right to self-defense.

Non-Resistance," reprinted in Peace and Nonviolence 8 ("a true Christian cannot . . . kill, maim or otherwise absolutely injure any human being, in personal self-defense, or for the sake of his family, or anything he holds dear."). See also Hanigan, Martin Luther King, Jr. and the Foundations of Nonviolence (1984); Gandhi, Collected Writings on Non-violent Resistance (1951).

Rowe's reliance on the Hansel and Gretel story in his Petition for Certiorari at 9 is especially inappropriate because life inside a maximum security prison is no fairy tale. Indiana's correctional officials properly prohibit self-defense as a complete defense in prison discipline cases to deter all fighting and to eliminate the need to adjudicate which party was the aggressor in every case.

The Court of Appeals agreed that even if there were some fundamental right to self-defense in other contexts, the legitimate penological concerns stated by Indiana's correctional officials would permit the existing policy in prison discipline cases. a-11; a-25; a-28. Indiana's rule that self-defense is not an absolute defense to culpability in a prison disciplinary proceeding, but may be used as mitigation, is designed to promote prison discipline and minimize violence.

> The Department of Correction has an Adult Disciplinary Policy and Procedures which govern disciplinary proceedings within the Department of Correction. Those policies and procedures do not specifically recognize self-defense as a defense to a rule violation simply because to do so, in my belief, would only encourage offenders to use force in the name of self-defense and would provide a recognized excuse for the use of force. Such

> written recognition of self-defense, in my opinion, would only add to the number of assaults by inmates on other inmates.

S.A. 3 (Affidavit of Defendant Watsen). This Court should defer to the judgment of the officials charged with administering prisons embodied in this rule. Turner v. Safley, 482 U.S. 78, 85 (1987); Block v. Rutherford, 468 U.S. 576, 584-585 (1984). Judge Ripple's view, in dissent, that permitting self-defense would somehow protect the "weak and vulnerable," a-17, is backward. Permitting self-defense as a complete defense would allow more brutalization of the "weak and vulnerable" by inmates who later would seek to justify their behavior as "self-defense" and give the disciplinary and judicial systems the task of sorting out who did what to whom in every case.

Respondents' position is consistent with the philosophical underpinnings of the doctrine of self-defense. In Lockean social contract theory, self-defense is available only when the state is not present to provide protection.

> Because the state exists for the protection of its members, the social contract includes a built-in limitation: each individual retains his or her natural rights for exercise in situations where appeal to established authority is impossible. Such a situation arises where aggression is sudden and immediate, so that state intervention cannot prevent its effect, and when the effect of the aggression threatened would be so severe and lasting that no subsequent state response could adequately substitute for prevention.

Fabricant, Homicide in Response to a Threat of Rape, 11 Golden Gate L. Rev. 945, 954 (1981) (emphasis supplied). In prisons, security personnel are almost always present or within shouting distance. The rule at issue in this case encourages prisoners to call for help rather than to exercise self-help, thus maintaining prison discipline and security.

CONCLUSION

For the reasons stated in this Opposition, this Court should deny the Petition for Certiorari.

Respectfully submitted,

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